

**STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE  
45 Fremont Street, 24th Floor  
San Francisco, California 94105**

**NOTICE OF PROPOSED ACTION**

**DATE: June 17, 2008**

**REGULATION FILE: REG-2008-00021**

**SUBJECT OF PROPOSED RULEMAKING**

The Insurance Commissioner proposes to adopt the regulations described below after considering comments from the public. The Commissioner proposes to add to Title 10, Chapter 5, Subchapter 3, article 14 Title Insurance of the California Code of Regulations a new Subarticle 1 entitled "Controlled Business Source" and consisting of sections 2555., 2555.1, 2555.12., 2555.13., 2555.2., 2555.21., 2555.22., 2555.23., 2555.3., 2555.31., 2555.32., 2555.33., 2555.4., and 2555.41. The proposed regulations will promote the regulation of the business of title insurance emanating from controlled business sources to enhance competition by expressing the requirements for record keeping, annual reports, submission requirements, examinations, disclosures to the public, indications of source of business including percentages and delineating the enforcement procedures that may be employed by the Insurance Commissioner, including actions on applications, licenses, certificates of authority, permits, deposits and monetary penalties in order to implement and effect compliance by the title industry with the Controlled Business Source statute, Article 4.5 of Chapter 1, Part 6, Division 2 of the Insurance Code commencing with Insurance Code section 12396 and other related statutes.

**PUBLIC HEARING**

The Commissioner will hold a public hearing to provide all interested persons an opportunity to present statements or arguments, either orally or in writing, with respect to this regulation, as follows:

**Date and time:           Tuesday, August 12, 2008 at 10:00 a.m.**

**Location:               Department of Insurance  
Administrative Hearing Bureau Hearing Room  
45 Fremont Street, 22nd Floor  
San Francisco CA 94105**

The hearing will continue on the date noted above until all testimony has been submitted or 4:00 p.m., whichever is earlier.

## **PRESENTATION OF WRITTEN COMMENTS; CONTACT PERSONS**

All persons are invited to submit written comments on the proposed regulations during the public comment period. The public comment period will end at 5:00 p.m. on August 12, 2008. Please direct all written comments to the following contact person:

Jill Alexis Jacobi  
Senior Staff Counsel  
California Department of Insurance  
45 Fremont Street, 24th Floor  
San Francisco, CA 94105  
Telephone: (415) 538-4426

Questions regarding procedure, comments, or the substance of the proposed action should be addressed to the above contact person. In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Pretrice Curry-Bossett  
Senior Legal Analyst  
California Department of Insurance  
45 Fremont Street, 24th Floor  
San Francisco, CA 94105  
Telephone: (415) 538- 4181

## **DEADLINE FOR WRITTEN COMMENTS**

All written materials must be received by the Insurance Commissioner, addressed to the contact persons at his address listed above, no later than 5:00 p.m. on August 12, 2008. Any written materials received after that time may not be considered.

## **COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE**

The Commissioner will accept written comments transmitted by e-mail provided they are sent to the following e-mail address: [JacobiJ@insurance.ca.gov](mailto:JacobiJ@insurance.ca.gov). The Commissioner will also accept written comments transmitted by facsimile that are ten pages or less and are directed to the attention of Jill Jacobi and sent to the following facsimile number: (415) 904-5729. **Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.**

## **AUTHORITY AND REFERENCE**

The proposed regulations will implement, interpret and make specific the provisions of Insurance Code sections 104, 700, 717, 720, 730, 733, 734, 790.03, 791.19, 826, 1011, 1065.1, 1065, 1065.3, 1065.7, 1215, 12340.3, 12340.9, 12340.11, 12350, 12351, 12352, 12353, 12354, 12355,

12389, 12389.1, 12389.2, 12396, 12397, 12397.5, 12397.5, 12398, 12399, 12400, 12408.5, 12409, 12414.22, 12414.24, 12414.25, 12414.30, 12921, and 12926.1, Code of Civil Procedure section 2015.5 and Evidence Code section 1550 (a). Insurance Code sections 700, 717, 720, 790.10, 791.19, 1065.3, 12389, 12389.1, 12389.2, 12396, 12397, 12397.5, 12398, 12399, 12408.5 12414.22, 12414.24 and 12921 provide authority for this rulemaking, as do the following decisions *CalFarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989), *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994), *McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348 (1989) and *George v. Department of Alcoholic Beverage Control*, 149 Cal.App.2d 702 (1957).

## INFORMATIVE DIGEST

### SUMMARY OF EXISTING LAW AND POLICY STATEMENT OVERVIEW

Under existing California law, title insurers and underwritten title companies must actively compete for title business and must make submissions to the Insurance Commissioner as required by the regulator to ascertain such competitive activities. Title insurers and underwritten title companies also must under existing law maintain records sufficient to indicate the source of their title orders and must make annual reports to the Insurance Commissioner under penalty of perjury regarding the percentage of business from controlled sources. Title insurers and underwritten title companies that are controlled by, control or are in common control with persons or entities involved in the sale or financing of property – principals, lenders, representatives or agents – must also make certain indications and demonstrations at the time of application for licensure, certificate of authority or stock permit pertaining to competition and, if applicable, percentages of closed title orders from controlled business sources. Title insurers and underwritten title companies that perform escrow functions must maintain statutory deposits. Title insurers and underwritten title companies and the individuals involved in their business operations are subject to examination by the Insurance Commissioner for their compliance with the Insurance Code including these provisions. Under current California law, title orders of title insurers and underwritten title companies are deemed to emanate from controlled business sources when title insurers and underwritten title companies have these types of controlled business source arrangements, also known as affiliated business arrangements. All title insurers and underwritten title companies must also comply with state law that prohibits rebates and commissions for the purpose of inducement of title business and with California laws that prohibit the making of statements to the public which are misleading, deceptive or untrue and must maintain records regarding the payments of commissions. State law provides for denial of the application for license, certificate of authority or permit, suspension or revocation of existing license, certificate of authority or permit for violations of laws pertaining to controlled business arrangements, and as appropriate monetary penalties or other disciplinary action as determined by the Insurance Commissioner and pursuant to procedures prescribed therefor. Cease and desist orders may be issued for corrective action as appropriate under the circumstances.

The policy underlying the proposed action is to implement and make specific the existing Controlled Business Source statute and other related statutory requirements to enhance regulatory enforcement and to achieve greater compliance with the provisions thereof. Towards the achievement of that policy goal, the proposed regulations set forth an effective date for

compliance and express the statutes and purpose of the proposed regulations of enhancing competition in the title industry clarification of what is required for compliance and streamlining enforcement efforts. The proposed regulations seek to implement and make specific the Controlled Business Source statute and related statutes by setting forth the definition of key terms that are not defined or are not adequately defined in the existing statutes. Common term definitions are intended to facilitate compliance as well as comparison of the information received and reviewed. The proposed regulations also implement the statutory provisions by setting forth the evidentiary quality and content of records that must be maintained by title insurers and underwritten title companies and by setting forth a minimum time period for retention of such records. The proposed regulations also provide for the requirements of the annual reports filed by title insurers and underwritten title companies, including specifications as to content and quality of the information reported, to better assess the level of competition in the title industry. The manner of requests for submission to the Insurance Commissioner and the ability of the Insurance Commissioner to examine for compliance is also expressed. Further title insurers and underwritten title companies will be required to disclose their controlled business source arrangements to the public in their advertising and websites. The proposed action will also establish several alternative enforcement mechanisms including denial of applications, suspension or revocation in whole or part of license, certificate of authority or permit, statutory deposit increases and monetary penalties as specified and pursuant to procedures as described.

#### EFFECT OF PROPOSED ACTION

The proposed regulations should enhance competition in the title insurance marketplace by promoting the regulation of title insurance business particularly closed title orders generated from controlled business sources, which are affiliates of title insurers and underwritten title companies that are involved in property related business activities.

The proposed new regulations set forth the authority pursuant to which they are to be promulgated and provide for an effective date of January 1, 2009. This section will establish an effective date for the record keeping, reporting, indications and demonstrations as specified in these new regulations. The Controlled Business Source statute and related statutes require title insurers and underwritten title companies to maintain certain business records for examination by and production to the Department of Insurance and annual reporting of certain information to the Department of Insurance. The Controlled Business Source statute also requires certain indications and demonstrations at the time of application for license or permit. These regulations will implement and make specific those requirements and in addition will require that controlled business source arrangements be disclosed in advertising and websites of title licensees. The proposed effective date will clarify when title insurers and underwritten title companies will need to comply with these new requirements. Further these regulations contain a number of enforcement mechanisms for enforcing compliance with the Controlled Business Source statute, related statutes and these regulations. The effective date will establish a starting point for these enforcement mechanisms.

The proposed new regulations explain that the purpose of these regulations is to set forth the rules and procedures necessary to promote the regulation of the business of title insurance emanating from controlled business sources so that competition in the title industry is enhanced,

expectations for compliance by title insurers and underwritten title companies are clarified, and regulatory enforcement efforts are streamlined. Not all title entities have controlled business sources. The proposed new regulations will clarify the purpose of these regulations so that all title insurance licensees will be apprised that these regulations address all title entities, particularly those with controlled business sources, and the requirement that all title insurers and underwritten title companies maintain records and report source information in relation to business source.

The proposed new regulations define a number of terms as reasonably necessary for the implementation and enforcement of the Controlled Business Source statute and these regulations. The proposed new regulations define certain terms to facilitate understanding and compliance with the Controlled Business Source statute by title licensees. The proposed regulatory section defines the terms "Affiliate," "Binder," "Commitment," "Closed Title Order," "Control" including the terms "controlling" "controlled by" and "under common control with," "Controlled Business Source," "Documented," "License," "Licensee," "Non controlled business source," "Percentage," "Preliminary Report," "Source," "Title business," and "Title business transacted."

By defining these terms the new proposed regulations will clarify and provide a common meaning for terms such as "closed title order" which are not defined in the statute. An express definition of these terms in the proposed section should facilitate compliance with the statute and should also facilitate comparisons of reports, records and other information received by the Department of Insurance as well as enforcement of the statute. The proposed regulations should also eliminate confusion that may exist from the Controlled Business Source statute definition of certain terms by cross-reference to other Insurance Code sections, such as the term "controlled business source." Two terms, "license" and "licensee" are defined in the Controlled Business Source statute by inclusion of terms such as "title insurance entity" that are not defined. The new proposed regulations will clarify these terms, for example what title insurance entities are licensees for purposes of the Controlled Business Source statute and these regulations. These proposed regulations will define terms that are included within definitions. An express definition of these terms in the proposed regulations should facilitate compliance with the statute and facilitate comparisons of reports, records and other information received by the Department of Insurance and its enforcement of the statute. In addition these new regulations will implement the provision of the Controlled Business Source statute that provides for the deemed emanation of business from controlled business sources in a manner that is consistent with the Controlled Business Source statute's requirements for record keeping of all source data including non-controlled source data.

The proposed new regulations will provide the requirements for indications of the intent to actively compete at the time of application and clarify the meaning of "marketplace" for underwritten title company applicants and title insurance company applicants as well as other requirements, including the manner in which intent shall be established in the application. The proposed regulations will also provide the requirements for indications at the time of application of intent to limit controlled source business to no more than fifty percent (50%) of an applicant's closed title orders. The new regulations will set forth that failure to so establish an intent to actively compete at the time of application shall be grounds for denial of the application for license, certificate of authority or permit. As proposed, these new regulations should facilitate

compliance and uniformly implement and enforce the intent to compete and limited controlled business source business provisions of the Controlled Business Source statute.

These new regulations make specific the reporting requirements for the ninety day annual report by all title licensees and the thirty day report made thereafter by title insurers by clarifying filing requirements such as submission address, the month and calendar date by which reports must be so filed, and the requirements for verification by chief executive officers or their designees. Further these new regulations will add a new requirement that reports of underwritten title company licensees shall be simultaneously transmitted to their underwriters to implement the statutory provisions pertaining to underwriter's thirty day reports that comment on the accuracy of the underwritten title company reports. These new regulations should provide for greater accuracy and uniformity of reported information thus enhancing the Insurance Commissioner's ability to review competitive information.

These new regulations clarify and specify what underwritten title companies and title insurer underwriters need to report to the Department of Insurance by expressing what is required in the content of these reports, together with the quality and character of the verifications, which will enhance the reliability and quality of the data provided, which should enhance the ability of the Department to compare reports, records and other information received by the Department and its enforcement of the statute. Similarly the proposed regulations clarify and specify what underwriters need to report to the Department of Insurance upon review of underwritten title company reports. These new regulations include a new requirement when title insurers can not confirm that underwritten title company report provides the correct information or the identity and location of individuals and information such that the Commissioner may as warranted conduct further examination. Thus these new regulations should facilitate the full implementation and enforcement of the Controlled Business Source statute. By expressing what is required in the content of these reports, together with the quality and character of the verifications, these new regulations should facilitate compliance with the statute, regulatory use of the reports, records and other information received by the Department of Insurance and its enforcement of the statute. These new regulations also provide requirements for the suspension of annual reporting requirements if controlled business sources generate less than five percent of a title licensee's business. If a title licensee reports five percent or less of all its title business transacted emanated from controlled business sources and identifies individuals and documents for examination, these new regulations provide that the title licensee will be relieved of further reporting until such time as business emanating from controlled business sources exceeds five percent, at which time the obligation to report will resume. Thus these new regulations will implement the suspension of the reporting requirement thus implementing the Controlled Business Source statute by establishing requirements such as the reference to individuals, documents and data as may be necessary for verification by regulatory examination.

The Controlled Business Source statute requires maintenance of certain records sufficient to indicate the source of title orders, but does not specify the length of time such records need be maintained, nor the quality and certain specific content of the records to be so maintained. These new regulations will clarify that each title licensee shall maintain records for a minimum of seven years, that documents need be maintained as are sufficient to document the source of title business transacted by complete name and address of the source, any commission or other consideration paid to the source, and whether or not the source is a controlled business. These

new regulations also will require maintenance of total dollars or income information from each transaction and the total of all income earned for each quarter of the calendar year. These new regulations will also require maintenance of the same transaction records for the same seven year time period as to closed title orders, however such records shall include a count of each closed title order by licensee, and the total number of closed title orders for each calendar year quarter rather than total dollars or income. As a result of compliance with these new regulations, title licensee documents and data should be maintained as is sufficient and necessary for verification by regulatory examination in compliance with the Controlled Business Source statute and to aid the regulator in measuring competitive behavior in the title industry.

These new regulations should clarify that requests for submission made by the Department of Insurance shall be in writing, and reply submissions shall be completely responded to within twenty days of receipt thereof, or in such other time period as is reasonable under the circumstances and acceptable to the Commissioner. These new regulations will also specify that the submissions are the records or reports maintained pursuant to these regulations and the Controlled Business Source statute. It is anticipated that these regulations will streamline the regulatory process by providing a mechanism for such submissions to enhance the implementation and enforcement of the Controlled Business Source statute and to facilitate the regulator's ability to measure competitive behavior.

These regulations will provide a new requirement of disclosure of controlled business source arrangements in publicly disseminated information which will provide title customers with additional information upon which to make an informed title insurance service purchasing decision. These new regulations will specify that each licensee shall disclose its controlled business source arrangements in all information generally disseminated to the public in this state, including its internet website and any newspapers or other publications or devices by which the licensee advertises. As a result, the purchasers of title insurance services, who often rely upon the recommendations of trusted advisors when purchasing such title services, should not be misled as to the nature of the services they are purchasing. It is anticipated that these new regulations and the disclosure requirements will provide greater protection to the California public and enhance competition in the title insurance marketplace.

These new proposed regulations provide that the Commissioner may, as often as may be reasonable and necessary to determine a licensee's compliance with the standards of these regulations, the Controlled Business Source statute and other Insurance Code provisions, examine each licensee, including a review of the records maintained by each licensee to ascertain the source of title business and the source of closed title orders. By so providing, these new regulations will further implement the Controlled Business Source statute provisions and clarify that examination is one of the regulatory mechanisms that the Commissioner may use to enforce compliance with the Controlled Business Source statute and related statutory provisions.

These new regulations will set forth the enforcement options the Commissioner may utilize for failure of a title licensee to comply with any of the requirements of these regulations. Specifically these new regulations will specify that failure to comply with the Controlled Business Source statute and these regulations may subject a title licensee to denial of its application for title license or securities permit, suspension, restriction or revocation in whole or

in part of an issued license or permit, an order to cease and desist, and an increase in statutory deposits and monetary penalties. The effect of these new regulations shall be to express all of the disciplinary tools the Commissioner may utilize against a licensee for violations of these regulations and the Controlled Business Source statute and the procedures which should result in regulatory compliance by the industry as well as facilitate and streamline any enforcement actions as may be taken by the Commissioner hereafter. Finally, these new regulations provide that if any provision of these regulations or the application thereof is determined to be invalid, the invalidity shall not affect the other provisions or applications of these regulations which are separable. As a result, the entire regulatory package should be read provision by provision as each provision may be applied stand on its own without consideration of the validity of another provision.

## **MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS**

The proposed regulations do not impose any mandate on local agencies or school districts. There are no costs to local agencies or school districts for which Part 7 (commencing with Section 17500) of Division 4 of the Government Code would require reimbursement.

## **COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES OR SCHOOL DISTRICTS OR IN FEDERAL FUNDING**

The Commissioner has determined that the proposed regulations will result in no cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, no other nondiscretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State.

## **ECONOMIC IMPACT ON BUSINESS AND THE ABILITY OF CALIFORNIA BUSINESSES TO COMPETE**

The Commissioner has made an initial determination that the adoption of the proposed regulations may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Title insurers and underwritten title companies will be required to maintain specific records for a period of seven years, which shall record the source of title business and include quarterly total calculations. Annual reports will also be required and businesses will be required to submit records to the Commissioner upon written request. The types of businesses that may be affected are title insurers and underwritten title companies. The Commissioner has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables for compliance with the Controlled Business Source statute that take into account the resources available to businesses;
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses;
- (iii) The use of performance standards rather than prescriptive standards; and



(iv) Exemption or partial exemption from the regulatory requirements for certain businesses.

## **POTENTIAL COST IMPACT ON PRIVATE PERSONS OR BUSINESSES**

The proposed regulations implement existing statutes but may have a significant impact on the many title businesses currently operating in California. The Commissioner is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Not all title insurers and underwritten title companies have controlled business source arrangements; however all title insurers and underwritten title companies will be required to comply with the requirements set forth in the proposed regulations, the exact potential cost for such compliance is unknown. A title insurer or underwritten title company that is not presently capturing and maintaining the data required under the new proposed regulations or not already making the annual reports to the Insurance Commissioner as set forth in the new regulations will be affected by the proposed regulations. A title insurer or underwritten title company that advertises or has a website or other electronic web based system available to the public will be affected by the proposed regulations. A title insurer or underwritten title company that violates the requirements of the statutes or these regulations, should the proposed regulations become effective, could lose its authority to engage in title business or suffer other costs including the assessments of monetary penalties. Although the controlled business source arrangements would still be permitted under the proposed regulations, it is possible that some title business entities may go out of business as a result of the proposed regulations, particularly if they rely heavily on controlled business sources for their title business and do not comply with the record keeping and reporting requirements. The immediate impact for such a loss is estimated to be on a yearly net business revenue basis for a title insurer, a yearly net business revenue loss that could reach \$33.2 million or more depending on the volume of title business that it engages in or less than that should it be required to curtail certain title business. Similarly an underwritten title company could suffer an immediate loss of a year's net business revenue that could reach \$1.4 million or more annually depending on the volume of title business that it engages in or less than that should it be required to curtail certain title business but not all business.

The proposed regulations could force title insurers and underwritten title companies to revamp their business plans related to reliance upon controlled business sources. Some title insurers and underwritten title companies may need to develop new strategies for accessing the market place or for ownership and other affiliated business arrangements, or may need to re-engineer their businesses plans to comply with these regulations. We estimate that the business development and re-engineering costs for compliance with these regulations could cost these companies approximately \$500,000 (e.g., costs of actuarial consultants, legal advice, regulatory filing and/or approvals, marketing, training, etc...). We also estimate that these companies could incur approximately \$750,000 in system development and implementation costs to develop and implement computer applications as may be necessary to comply with the new proposed regulations.

## **EFFECT ON JOBS AND BUSINESSES IN CALIFORNIA**

The Commissioner is required to assess any impact the regulations may have on the creation or elimination of jobs in the State of California, the creation of new businesses, the elimination of new businesses, and the expansion of businesses currently operating in the state.

The proposed regulations implement existing statutes and should not have a significant impact on jobs and formation of new business in California. It is possible and certainly anticipated that the proposed action could have an overall neutral or positive impact on jobs and businesses in California. However, the proposed regulations could force one or more domestic insurers and several underwritten title companies, all of whom are domestic, to cease or limit operations, in which case the salaries, wages, and benefits lost to its employees could represent \$245 million or more per year. Collectively the title insurers and underwritten title companies stand to lose as much as \$732 million in annual after tax income. While underwritten title companies may act as agents for more than one title insurer, many underwritten title companies have exclusive underwriting relationships with one title insurer at a time, where the closure of one title insurer may result in an underwritten title company becoming the agent of another title insurer. The title insurance businesses of some insurers and underwritten title company agents could be reduced or eliminated should the proposed regulations become effective, resulting in the elimination of jobs held by individuals employed by those businesses. In the Commissioner's assessment, this regulatory action will enhance competition which may result in either the increase or elimination of businesses and jobs in California. If there are a loss of jobs and businesses, the extent to which jobs and businesses will be lost should be offset by other improvements in terms of the State's aggregate economic activity. The proposed regulations should not, however, adversely affect new business nor significantly impact the expansion of many if not all title businesses already doing business in California.

## **FINDING OF NECESSITY**

The Commissioner finds that it is necessary for the welfare of the people of the state that the regulations apply to businesses.

## **PRESCRIPTIVE STANDARDS VERSUS PERFORMANCE STANDARDS**

The Commissioner proposes the adoption of prescriptive standards as defined in Government Code section 11342.590 rather than performance standards as defined in Government Code section 11342.570 because the proposed regulations seek to implement the requirements of the Controlled Business Source statute, Insurance Code sections 12396 through 12399, inclusive and related statutes, however the Commissioner invites alternative proposals including proposals of a performance nature.

## **IMPACT ON HOUSING COSTS**

The proposed regulations will have no significant effect on housing costs.

## **ALTERNATIVES**

The Commissioner must determine that no reasonable alternative considered by the Commissioner or that has otherwise been identified and brought to the attention of the Commissioner would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action, and the Commissioner must consider the substitution of performance standards for prescriptive standards.

## **IMPACT ON SMALL BUSINESS**

The Commissioner has determined that the proposed amendments will affect small businesses to the extent that it affects underwritten title companies. However, insurance companies, which will also be affected, are by definition not small businesses, pursuant to Paragraph (b) (2) of Government Code section 11342.610. This notice will be mailed to underwritten title companies licensed in California.

## **COMPARABILITY AND CONFORMITY WITH FEDERAL LAW**

Under current federal law, the regulation of insurance, including title insurance, is primarily the responsibility of the states. However title insurance entities are also subject to federal law specifically the “Real Estate Settlement Procedures Act” or “RESPA.” See 12 U.S.C. § 2601 *et seq.* Under federal law, California law in general is not annulled, altered, affected or exempted by RESPA, except to the extent California laws are inconsistent with federal law, and then only to the extent they are inconsistent and the inconsistency does not provide greater protections for the consumer as specified. See 12 U.S.C. § 2616. Moreover, federal law specifically provides that no provision of state law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with RESPA provisions regarding affiliated business arrangements and kickbacks. See 12 U.S.C. § 2607 (d) (6). Thus, although the proposed regulations are different in significant respects to the federal RESPA law, they shall not, by that federal RESPA law, be construed as inconsistent therewith as they are more stringent limitations on affiliated business arrangements.

Federal law significantly differs from the proposed regulations as hereafter described. RESPA is for the most part enforced by the federal Housing and Urban Development agency or “HUD” not the California Insurance Commissioner. Affiliated business arrangements “ABAs” under RESPA involve persons who are in the position to refer title business that have either an ownership interest of one percent or greater who refer business and includes certain familial, corporate and contractual relations. Under RESPA, ABAs which are comparable to controlled business source arrangements as defined and permitted by California law, are permitted as long as 1) the arrangements are disclosed to consumers together with the written estimate of charges no later than the time of the referral 2) ABAs do not require directly or indirectly the purchase of title insurance from a particular title company, and 3) ABAs may only receive a return on their ownership interest and payment for services rendered. See 12 USC §§ 2602, 2607 and 2608 and 24 CFR § 3500.15. Current federal law requires that ABA records maintained pursuant to

federal regulations must be retained for five years after the date of execution (see 24 CFR § 3500.15 (d)) not seven years as is proposed in these regulations. RESPA generally prohibits the giving or acceptance of kickback referral fees among persons involved in the underlying property transaction or ABAs, however it only provides as a remedy actions for injunction against affiliated business arrangements violating federal provisions regarding referral fees and affiliated business; federal law in this area does not authorize the levy of civil penalties. In addition HUD has issued a Statement of Policy 1996-2 that details factors to be used to determine whether a title agency is a bona fide operation or a sham operation. Although these federal provisions differ from current state law and these proposed regulations, California law is more stringent and protective of the California public and these proposed regulations should enhance competition in the title insurance marketplace, facilitate enforcement of the Controlled Business Source statute and otherwise enhance the enforcement of and compliance with these similar federal laws. In addition, other current federal law, the federal Gramm-Leach-Bliley Act of 1999 ("GLBA") 15 U.S.C.A. § 6713, consistently permits title insurance sales activities by national banks and their subsidiaries in states where such activities were permitted under existing state law under a grandfathering clause.

## **TEXT OF REGULATIONS AND STATEMENTS OF REASONS**

The Department has prepared an initial statement of reasons that sets forth the reasons for the proposed action. Upon request, the initial statement of reasons will be made available for inspection and copying. Requests for the initial statement of reasons or questions regarding this proceeding should be directed to the contact person listed above. Upon request, the final statement of reasons will be made available for inspection and copying once it has been prepared. Requests for the final statement of reasons should be directed to the contact person listed above.

The file for this proceeding, which includes a copy of the express terms of the proposed regulations, the statement of reasons, the information upon which the proposed action is based, and any supplemental information, including any reports, documentation and other materials related to the proposed action that is contained in the rulemaking file, is available by appointment for inspection and copying at 45 Fremont Street, 24th Floor, San Francisco, California 94105, between the hours of 10:00 a.m. and 4:30 p.m., Monday through Friday.

## **AUTOMATIC MAILING**

A copy of this notice, including the informative digest, which contains the general substance of the proposed regulations, will automatically be sent to all persons on the Insurance Commissioner's mailing list.

## **WEBSITE POSTINGS**

Documents concerning this proceeding are available on the Department's website. To access them, go to <http://www.insurance.ca.gov>. Find at the right hand side of the page the heading 'QUICK LINKS.' The third item in this column under this heading is 'For Insurers'; on the drop-down menu for this item, select 'Legal Information.' When the 'INSURERS: LEGAL

INFORMATION' screen appears, click the third item in the list of bulleted items near the top of the page: 'Proposed Regulations.' The 'INSURERS: PROPOSED REGULATIONS' screen will be displayed. Select the only available link: 'Search for Proposed Regulations.' Then, when the 'Search or Browse for Documents for Proposed Regulations' screen appears, you may choose to find the documents either by conducting a search or by browsing for them by name.

To search, enter "REG-2008-00021" (the Department's regulation file number for these regulations) in the search field. Alternatively, search using as your search term the Office of Administrative Law's notice file number assigned to the regulations ("Z-08-\*\*\*\*\*"), or search by keyword or term ("controlled business," for example, or "title order"). Then, click on the 'Submit' button to display links to the various filing documents.

To browse, click on the 'Browse All Regulations' button near the bottom of the screen. A list of the names of regulations for which documents are posted will appear. Find in the list the 'Title Insurance – Controlled Business Source' link, and click it. Links to the documents associated with these regulations will then be displayed.

## **MODIFIED LANGUAGE**

If the regulations adopted by the Department differ from those which have originally been made available but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Interested persons should request a copy of these regulations prior to adoption from the contact person listed above.